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## Examining the Legalization of Daily Fantasy Sports

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# EXAMINING THE LEGALIZATION OF DAILY FANTASY SPORTS

By Mark Dourmashkin

Technology has undoubtedly changed the way fantasy sports are delivered to the consumer.<sup>1</sup> Through the creation and development of fantasy sports over the past decades, the fantasy sports industry has changed the way people watch and enjoy sports.<sup>2</sup> The idea of fantasy sports began in the 1920s and grew in the early 1960s when the first fantasy football league was created.<sup>3</sup> Nearly twenty years later, the first official fantasy league was created in 1980, and the creators of the league referred to the fantasy as “real life.”<sup>4</sup> At the time, the game was simple because newspaper box scores were the only resource fantasy leagues had to keep track of statistics.<sup>5</sup>

With the emergence of the Internet and computers to the general public in the mid-1990s, new technology allowed fantasy sports to connect to millions of people around the United States.<sup>6</sup> Online resources exposed fantasy users to an unlimited wealth of material to research player statistics and create fantasy

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<sup>1</sup> Ben Klayman, *Technology spurs growth of fantasy sports*, REUTERS (Sept. 25, 2008, 4:16 AM), <http://www.reuters.com/article/us-fantasysportsnews-idUSTRE48O1VE20080925>.

<sup>2</sup> Chris Isidore, *How fantasy sports changed the NFL*, CNN (Sept. 11, 2015, 3:58 PM), <http://money.cnn.com/2015/09/11/news/companies/fantasy-football/>.

<sup>3</sup> Jon Saraceno, *As fantasy football fever continues to spread, it's not all geeks to me*, USA TODAY (Aug. 8, 2006, 12:32 AM), [http://usatoday30.usatoday.com/sports/columnist/saraceno/2006-08-17-saraceno-fantasy-football\\_x.htm](http://usatoday30.usatoday.com/sports/columnist/saraceno/2006-08-17-saraceno-fantasy-football_x.htm).

<sup>4</sup> Will Leitch, *The Evolution of Fantasy Sports*, SPORTS ON EARTH (Aug. 31, 2015), <http://www.sportsonearth.com/article/146446906/evolution-fantasy-football-sports-draft>; see also Stephen Mihm, *Fantasy Sports' Long Run of Good Luck*, BLOOMBERG VIEW (Oct. 29, 2015, 6:08 PM), <https://www.bloomberg.com/view/articles/2015-10-29/fantasy-sports-long-run-of-good-luck>

<sup>5</sup> Leitch, *supra* note 4.

<sup>6</sup> John McDuling, *The bizarre, multibillion-dollar industry of American fantasy sports*, QUARTZ (Dec. 13, 2014), <https://qz.com/298042/the-bizarre-multi-billion-dollar-industry-of-american-fantasy-sports/>.

leagues with people that lived across the country.<sup>7</sup> Fantasy sports added a new consumer group to an already large and popular sector of the professional sports industry.<sup>8</sup>

While the general concept of fantasy sports remains mostly similar to the idea created in 1980, the way fantasy sports are played has changed dramatically, based in large part to the popularity and growth of daily fantasy sports (“DFS”).<sup>9</sup> DFS are a subset of traditional fantasy sports that consists of a single-day, online fantasy sports contest.<sup>10</sup> DFS contests vary across a wide range of professional sports leagues, where participants select a lineup of players each week and score points based on how those players perform.<sup>11</sup> DFS has not only increased fan engagement by attracting new consumers to the sports industry but also has benefited professional sports leagues such as the NFL, MLB, NBA, and NHL who have all invested in DFS.<sup>12</sup> In 2006, Congress passed the Unlawful Internet Gambling Enforcement Act (“UIGEA”), which stated that participation in traditional fantasy sports leagues is legal.<sup>13</sup> However, the UIGEA has been silent towards DFS.<sup>14</sup> The vagueness of DFS under federal law and various different state laws have created the legal dilemma of whether DFS contests are legal.<sup>15</sup>

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<sup>7</sup> Leitch, *supra* note 4.

<sup>8</sup> Justin Tasch, *End Zone: Fantasy sports reaching new heights*, N.Y. DAILY NEWS (Nov. 8, 2014, 10:49 PM), <http://www.nydailynews.com/sports/football/zone-fantasy-sports-reaching-new-heights-article-1.2004224>.

<sup>9</sup> The term “DFS” will be used throughout this article as an abbreviation for “daily fantasy sports.”

<sup>10</sup> Eric Fisher, *Daily fantasy pushes to continue growth streak*, SPORTS BUSINESS DAILY (Mar. 16, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/03/16/Marketing-and-Sponsorship/Daily-fantasy.aspx>.

<sup>11</sup> *Id.*

<sup>12</sup> Louis Bien, *Everything you ever wanted to know about daily fantasy sports and why they're getting sued*, SB NATION (Nov. 24, 2015, 11:58 AM), <http://www.sbnation.com/2015/11/24/9791608/draftkings-fanduel-daily-fantasy-sports-lawsuit-new-york-internet-gambling>; see generally About, DRAFTKINGS, <http://about.draftkings.com> (last visited Nov. 11, 2016).

<sup>13</sup> Brent Schrottenboer, *Leagues see real benefits in daily fantasy sports*, USA TODAY (Jan. 1, 2015, 8:35 PM), <http://www.usatoday.com/story/sports/2015/01/01/daily-fantasy-sports-gambling-fanduel-draftkings-nba-nfl-mlb-nhl/21165279/>.

<sup>14</sup> Unlawful Internet Gambling Enforcement Act, 31 U.S.C. § 5363 (2012).

<sup>15</sup> Dustin Gouker, *UIGEA Author: “No One Ever Conceived” That Law Would Allow Daily Fantasy Sports*, LEGAL SPORTS REP. (May. 8, 2015, 8:15PM), <http://www.legalsportsreport.com/1369/uigea-author-did-not-intend-daily-fantasy-sports-carveout/>.

<sup>16</sup> Brent Holloway, *The dilemma of skill & what it means for the Daily Fantasy Sports industry's future*, BETTING TALK (Sept. 25, 2015, 10:25 AM), <http://www.bettingtalk.com/the-dilemma-of-skill-what-it-means-for-the-daily-fantasy-sports-industrys-future/>.

While Congress has commented on the legality of traditional fantasy sports, there are several options that should be considered to facilitate the legalization of daily fantasy sports in the United States.<sup>17</sup> First, an amended version of the UIGEA is necessary to include daily fantasy sports. Congress passed the UIGEA at a time when DFS contests did not exist.<sup>18</sup> Therefore, a proposed uniform federal law commenting on the legality of DFS will give states a clearer explanation of whether DFS contests under federal law constitute a game of chance or a game of skill. Second, states that have historically banned wagering of any kind of fantasy sports contest should reconsider their state laws based on recent congressional legislation, which shows congressional support for DFS contests.<sup>19</sup> While a lot of publicity around the DFS industry is centered on the illegality of its contests, a majority of states allow DFS operators to provide DFS contests to their residents.<sup>20</sup> New legislation in states like Arizona and Nevada, states where DFS operators are currently banned from providing DFS contests, has signaled a shift to congressional support in the DFS industry.<sup>21</sup> Lastly, an adverse decision continuing to ban DFS contests would damage a billion dollar industry.<sup>22</sup> DFS companies already have momentum on their side with a majority of the states supporting DFS contests as well as partnerships with the four major sports leagues in the United States: Major League Baseball (“MLB”), the National Basketball Association (“NBA”), the National

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<sup>17</sup> Ryan Rodenberg, *The true Congressional origin of daily fantasy sports*, ESPN (Oct. 28, 2015), [http://www.espn.com/chalk/story/\\_/id/13993288/daily-fantasy-investigating-where-fantasy-carve-daily-fantasy-sports-actually-came-congress](http://www.espn.com/chalk/story/_/id/13993288/daily-fantasy-investigating-where-fantasy-carve-daily-fantasy-sports-actually-came-congress).

<sup>18</sup> Darren Heitner, *An Abbreviated History Of FanDuel And DraftKings*, FORBES (Sept. 20, 2015, 9:41 AM), <http://www.forbes.com/sites/darrenheitner/2015/09/20/an-abbreviated-history-of-fanduel-and-draftkings/#29c686a22d12>; see generally 31 U.S.C. § 5363.

<sup>19</sup> Evan Grossman, *Legal sports gambling is gaining support, and here's why*, N.Y. DAILY NEWS (Jun. 15, 2016, 2:47 PM), <http://www.nydailynews.com/sports/legal-sports-gambling-gaining-support-article-1.2675108>.

<sup>20</sup> Daniel Roberts, *Here's where every state stands on daily fantasy sports*, YAHOO! (Aug. 4, 2016), <http://finance.yahoo.com/news/draftkings-fanduel-dfs-legal-states-000000560.html>.

<sup>21</sup> Alia Beard Rau, *Bill would legalize fantasy sports in Arizona*, AZCENTRAL (Feb. 18, 2016, 6:50 PM), <http://www.azcentral.com/story/news/arizona/politics/2016/02/18/bill-would-legalize-fantasy-sports-arizona/80564968/>; see also Chris Grove, *Nevada Gaming Says Daily Fantasy Sports is Gambling Under State Law, Illegal To Offer Without State License*, LEGAL SPORTS REP. (Oct. 15, 2015, 6:30 PM), <http://www.legalsportsreport.com/5173/nevada-says-dfs-is-gambling/>.

<sup>22</sup> See Joshua Brustein and Ira Boudway, *You Aren't Good Enough to Win Money Playing Daily Fantasy Football*, BLOOMBERG (Sept. 10, 2015, 8:00 AM), <https://www.bloomberg.com/news/articles/2015-09-10/you-aren-t-good-enough-to-win-money-playing-daily-fantasy-football>.

Football League (“NFL”), and the National Hockey League (“NHL”).<sup>23</sup>

This Article advocates for an amended federal law to include daily fantasy sports contests, analyzes state law gambling tests and introduces state legislation to show why the United States is trending towards legalizing DFS. Part I of this Article provides the history of fantasy sports and how the Internet changed the way fantasy sports are played. It also summarizes the basic rules of traditional fantasy sports contests by looking how a fantasy team is assembled. Part II analyzes the emergence of DFS companies such as DraftKings and FanDuel. This part further elaborates on how participants play DFS contests. Part III of this Article summarizes the economic impact of DFS contests provided by DraftKings and FanDuel. This part also provides statistics regarding the net worth of the DFS companies as well as partnership deals with MLB, NFL, and NBA. Part IV introduces the legality of daily fantasy sports under federal law whereas part V discusses daily fantasy sports under state law. Part VI offers analysis regarding the legalization of daily fantasy sports by discussing how to amend the Unlawful Internet Gambling Enforcement Act to incorporate daily fantasy sports, and illustrates why a majority of recent congressional legislation supports the legality of DFS contests. Lastly, Part VII presents the conclusion.

## I. HISTORY OF FANTASY SPORTS

### A. Early History

The idea of having a fantasy team originally emerged in the 1920s when the company Ethan Allen created a game where a “team” was created by fans collecting professional baseball player cards and then managing the team’s lineup.<sup>24</sup> This idea expanded in the early 1960s when a psychology professor created a contest that required an entry fee to draft a team of baseball players.<sup>25</sup> The rules of this contest simulated similar conditions in which traditional fantasy baseball leagues operate today.<sup>26</sup> The winner of the contest was determined by who selected players that earned the most points in a set of statistical

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<sup>23</sup> See generally Roberts, *supra* note 20; see Schrotenboer, *supra* note 13.

<sup>24</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 4 (2012).

<sup>25</sup> Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 2016 U. ILL. L. REV. 117, 120 (2016). William Gamson is a professor at Harvard University and the University of Michigan who created “The Baseball Seminar” among other college professors. *Id.*

<sup>26</sup> *Id.* at 120-21.

categories over the course of the Major League Baseball season.<sup>27</sup> A few years later in 1962, the first fantasy football league was created by a group of members associated with the Oakland Raiders.<sup>28</sup> Although these events sparked some foundation into the fantasy sports environment that exists today, it wasn't until 1980 when Daniel Okrent, a former New York Times public editor, created a game called "Rotisserie Baseball."<sup>29</sup>

Okrent's new fantasy league was based on the idea that fantasy teams would draft their own teams from a pool of current active Major League Baseball players.<sup>30</sup> The fantasy teams would then compete against each other based on how well the Major League Baseball players performed in real life.<sup>31</sup> This new element of fantasy sports gave people a simulation as if they were general managers of a team and had to make decisions based on statistics to succeed.<sup>32</sup> Conveniently for the fantasy sports industry, the same year Okrent innovated the fantasy game to a new level, the players in Major League Baseball went on strike.<sup>33</sup> Since casual baseball fans could not remain engaged in baseball during the 1980 strike, many sports writers used this opportunity to introduce fantasy sports.<sup>34</sup> These news articles on fantasy baseball created "a cult following among statistically-oriented sports fans" and expanded the concept of a Rotisserie fantasy league into other sports, like basketball and football.<sup>35</sup> With the foundation in place, the fantasy sports industry soon became a phenomenon with the emergence of the Internet.

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<sup>27</sup> *Id.*

<sup>28</sup> M. Christine Holleman, *Fantasy Football: Illegal Gambling or Legal Game of Skill?*, 8 N.C. J. L. & TECH. 59, 61 (2006).

<sup>29</sup> Zachary C. Bolitho, Note, *When Fantasy Meets the Courtroom: An Examination of the Intellectual Property Issues Surrounding the Burgeoning Fantasy Sports Industry*, 67 OHIO ST. L. J. 911, 916 (2006); see also Gary P. Quiming, Comment, *Playing by the Rules of Intellectual Property: Fantasy Baseball's Fight to Use Major League Baseball Players' Names and Statistics*, 29 U. HAW. L. REV. 301, 304 (2006) (Okrent coined the phrase "Rotisserie" after a restaurant called "La Rotisserie Francaise" where Okrent and his friends would talk about baseball).

<sup>30</sup> Quiming, *supra* note 29.

<sup>31</sup> Jonathan Crowl, *Thirty-Five Years Later, Fantasy's Creators Remember Thrilling Beginning*, THE POST GAME (Apr. 19, 2015), <http://www.thepostgame.com/blog/fantasy-life/201503/rotisseries-fantasy-baseball-creators-remember-beginning>.

<sup>32</sup> *Id.*

<sup>33</sup> Associated Press, *Chronology of the Baseball Strike*, N.Y. TIMES (Aug. 1, 1981), <http://www.nytimes.com/1981/08/01/sports/chronology-of-the-baseball-strike.html>.

<sup>34</sup> Quiming, *supra* note 29, at 305 (explaining how the game of "Rotisserie Baseball" spread quickly across the United States but failed to gain popularity because of the effort required to transmit information through U.S. mail to other participants). See also Bolitho, *supra* note 29, at 917.

<sup>35</sup> Edelman, *supra* note 25, at 121.

## B. The Internet Era of Fantasy Sports

In the mid-1990s, the Internet took center stage.<sup>36</sup> It transformed fantasy sports from a game where player statistics were calculated manually from a newspaper box score, to an online phenomenon that produced an unlimited wealth of resources on statistics and allowed fantasy users to connect with other users around the world.<sup>37</sup> Before the Internet, managing a fantasy sports team was a very time-consuming activity that required paperwork and calculators to compute the statistics into fantasy stats.<sup>38</sup> The Internet gave the fantasy sports consumer an easier and faster method to access player statistics and manage their fantasy teams.<sup>39</sup> In 1995, the Entertainment Sports Programming Network (“ESPN”) created the first Internet-based fantasy baseball game.<sup>40</sup> Today, approximately 57.4 million people in the USA and Canada play fantasy sports.<sup>41</sup>

## C. The Rules of Traditional Fantasy Sports Leagues

Fantasy sports are an online game that allows participants to join a “fantasy league” and become general managers of a self-assembled team consisting of real players from a professional sports team.<sup>42</sup> Once a fantasy league accumu-

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<sup>36</sup> *The Internet News Audience Goes Ordinary*, PEW RES. CTR.: U.S. POL. & POL’Y (Jan. 14, 1999), <http://www.people-press.org/1999/01/14/the-internet-news-audience-goes-ordinary/>.

<sup>37</sup> Edelman, *supra* note 24, at 10.

<sup>38</sup> See generally Leitch, *supra* note 4 (indicating that managers of fantasy sports had to manually compile statistics from the newspaper before the Internet, which made managing a fantasy football team “a chore”).

<sup>39</sup> See generally Nicole Davidson, Comment, *Internet Gambling: Should Fantasy Sports Leagues Be Prohibited?*, 39 SAN DIEGO L. REV. 201, 202 (2002) (concluding that an increase in the number of resources available for fantasy sports usage helped increase the popularity surrounding the industry).

<sup>40</sup> Edelman, *supra* note 24, at 10-11.

<sup>41</sup> *Industry Demographics*, FSTA, <http://fsta.org/research/industry-demographics/> (last visited Jan. 15, 2017) (noting there are even people who play daily fantasy contests for a living. Drew Dinkmeyer, a former investment analyst and now a sponsored pro at DraftKings, earns income by playing in daily fantasy contests. Dinkmeyer asserts that “fantasy sharks” who dedicate hours of research every day to calculating probabilities are 70% more likely to win than the inferior player. In a DraftKings contest with over 100,00 contestants, Dinkmeyer won the first place prize of \$1 million); see also David Purdum, *How daily fantasy players are winning*, ESPN (Feb. 25, 2015), [http://www.espn.com/chalk/story/\\_/id/12380815/the-skills-required-succeed-daily-fantasy-sports-espn-chalk](http://www.espn.com/chalk/story/_/id/12380815/the-skills-required-succeed-daily-fantasy-sports-espn-chalk).

<sup>42</sup> Jim McCormick, *So you want to play fantasy football?*, ESPN (Jul. 9, 2010), <http://www.espn.com/fantasy/football/fil/story?page=nfldk2k10howtoplay>. Fantasy leagues are often created by a group of friends or co-workers, but can form as a result of an unaffili-

lates enough “fantasy teams,” a “fantasy draft” is held before the season begins.<sup>43</sup> Fantasy leagues can have as few as four teams or as many as thirty teams but typically most leagues have eight to twelve teams.<sup>44</sup> Once a fantasy league is formed with a set number of fantasy teams, a fantasy draft is held to draft professional sports players.<sup>45</sup>

A fantasy draft is typically completed in one of three ways: (1) an online “snake” draft;<sup>46</sup> (2) an auction draft;<sup>47</sup> or (3) an offline “autopick” draft.<sup>48</sup> Once the specific draft type is chosen, the same fantasy teams select players to their roster from a pre-determined pool of players.<sup>49</sup> The fantasy draft is complete once every fantasy team fills their roster.<sup>50</sup> After the fantasy draft is completed and all the fantasy teams are assigned to a roster of players, the fantasy season begins when the first regular season game is played.<sup>51</sup> A fantasy team generates “fantasy points”<sup>52</sup> by adding the amount of points that each individual player on the team records, which are generated “based on the player’s statistical performances in actual games.”<sup>53</sup> Every fantasy team consists of a starting lineup

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ated group of players from the Internet; *see generally* Holleman, *supra* note 28.

<sup>43</sup> *See* Edelman, *supra* note 24, at 10.

<sup>44</sup> AJ Mass, *How to play fantasy football*, ESPN (June 24, 2014), [http://www.espn.com/fantasy/football/story/\\_/page/nfldk2k14intro/first-timer-guide](http://www.espn.com/fantasy/football/story/_/page/nfldk2k14intro/first-timer-guide); *see also* Holleman, *supra* note 28.

<sup>45</sup> McCormick, *supra* note 42.

<sup>46</sup> *Rules: Live Online “Snake Draft”*, ESPN, <http://games.espn.com/ffl/content?page=fflruleslivedraft2009> (last visited Oct. 3, 2016) (noting that for an online draft, the draft order is pre-determined, either manually by the fantasy league commissioner or randomly generated before the fantasy draft begins).

<sup>47</sup> *Drafts: Autopick*, ESPN, <http://games.espn.com/ffl/resources/help/content?name=drafts-autopick> (last visited Oct. 20, 2016) (describing that an auction draft involves a bidding process that allows each fantasy team to bid on a particular player where that player is then assigned to the fantasy team that bids the highest amount. Each fantasy team is assigned a fixed sum of “money” before the draft starts and the fantasy team can bid on players until every team has “purchased” a complete roster of players).

<sup>48</sup> McCormick, *supra* note 42.

<sup>49</sup> *See* Mass, *supra* note 44 (explaining that roster size varies depending on the type of fantasy league and the fantasy sport).

<sup>50</sup> *See* Holleman, *supra* note 28 (describing how the number of rounds in a fantasy draft varies by league).

<sup>51</sup> *See generally* Mass, *supra* note 44.

<sup>52</sup> *See generally* McCormick, *supra* note 42 (explaining how the point systems vary based on different sports).

<sup>53</sup> Nicole Davidson, Comment, *Internet Gambling: Should Fantasy Sports Leagues Be Prohibited?*, 39 SAN DIEGO L. REV. 201, 202 (2002); *see* Andy Behrens, *James Jones, beasting on fantasy benches*, YAHOO! (Dec. 16, 2012, 3:48 PM), <http://sports.yahoo.com/blogs/fantasy-roto-arcade/james-jones-beasting-bench-204829323.html> (“There’s basically nothing worse than leaving a monster stat line on your



and a bench where fantasy points that are accumulated by players on the bench, do not count towards the fantasy teams points total.<sup>54</sup> Fantasy teams compete against other teams in their fantasy league either in a weekly “head to head” matchup or a season-long rotisserie format. In a weekly “head to head” matchup, two fantasy teams play against each other where the outcome is determined by which fantasy team scores the higher number of fantasy points during that particular week.<sup>55</sup> In a season-long rotisserie format, there are no weekly matchups; the fantasy teams compete for a ranking over particular categories, which accumulate through the length of the season.<sup>56</sup> The success of a fantasy team in a rotisserie format depends on the season-long statistical outcomes of the fantasy player’s on each fantasy team.<sup>57</sup> The main difference between the two formats is that head-to-head leagues are based on a player’s weekly production whereas rotisserie leagues are based on a player’s season-long production.<sup>58</sup>

## II. THE CREATION OF DAILY FANTASY SPORTS

### A. Overview of DraftKings and FanDuel

Daily fantasy sports gained popularity when FanDuel was created in 2009 and DraftKings in 2012.<sup>59</sup> FanDuel and DraftKings represent 95% of the DFS market.<sup>60</sup> FanDuel’s success and popularity spiked when Comcast Ventures

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bench in the playoffs . . .”); McCormick, *supra* note 42 (detailing the number of each player’s position that allotted when constructing a starting roster and the number of “bench spots” available).

<sup>54</sup> See Davidson, *supra* note 53, at 202 (recognizing that the points a fantasy sport participant may earn are dependent upon their player’s performance).

<sup>55</sup> Paul Bruno, *Head-to-Head vs. Rotisserie Leagues: A Basic Primer*, ROTOWIRE (Aug. 24, 2011), <http://www.rotowire.com/hockey/showArticle.htm?id=13720>. For example, in “Fantasy Football League X,” “Team A” plays “Team B” in “Week 1.” The fantasy players on Team A score 100 points whereas the fantasy players on Team B score 90 points. Team A is assigned a win and Team B is assigned a loss. The fantasy points that are scored during a particular week do not carry over to the next week; *see generally* McCormick, *supra* note 42.

<sup>56</sup> Bruno, *supra* note 55.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> See Heitner, *supra* note 18 (relating to the Unlawful Internet Gambling Enforcement Act, it is legal to play both FanDuel and DraftKings in the United States); *see generally* 31 U.S.C. § 5363.

<sup>60</sup> See Sharon Terlep, *FanDuel, DraftKings Talk Tie-Up*, WALL ST. J. (June 13, 2016), <http://www.wsj.com/articles/fanduel-draftkings-talk-tie-up-1465855066>.

invested \$11 million into the company in 2013.<sup>61</sup> In 2015, FanDuel saw their company size increase even more when they acquired Zynga Sport 365's development and former vice president.<sup>62</sup> In 2014, DraftKings saw its popularity increase when they purchased the third largest daily fantasy sports company, DraftStreet, and subsequently saw its customer base increase by more than 50%.<sup>63</sup> FanDuel's and DraftKings' reported valuations are both worth over \$1 billion.<sup>64</sup>

#### B. What are Daily Fantasy Sports Contests?

Daily fantasy sports contests are a variation of traditional fantasy sports leagues that act under similar rules but consist of daily contests, thus avoiding the season-long commitment that traditional fantasy sports leagues require.<sup>65</sup> Similar to the traditional fantasy sports leagues, participants in a DFS contests create a team of professional players and are awarded fantasy points based on the stats from the players on the participant's team.<sup>66</sup> In most common traditional season long fantasy sports game, players are selected based on their draft position whereas in most DFS contests, the participant has a set salary budget and selects a team of players from a roster list without exceeding the allocated budget.<sup>67</sup> Once the participant has selected a roster, they compete in a single

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<sup>61</sup> Heitner, *supra* note 18

<sup>62</sup> See Heather Newman, *Fantasy sports firm FanDuel Creates new department with Zynga's laid-off employees*, VENTUREBEAT (May 22, 2015), <http://venturebeat.com/2015/05/22/fantasy-sports-firm-fanduel-creates-new-department-with-zyngas-laid-off-employees/> (providing that FanDuel hired 38 employees from Zynga Sports 365 and brought on their former vice president as executive vice president of product); Dustin Gouker, *FanDuel's Zynga Hires An New Orlando Office: What Does It Mean for DFS?*, LEGAL SPORTS REP. (May 26, 2015), <http://www.legalsportsreport.com/1548/fanduels-zynga-hires-and-new-orlando-office-what-does-it-mean-for-dfs/>.

<sup>63</sup> Steve Gardner, *Daily fantasy sports site DraftKings acquires DraftStreet*, USA TODAY, <http://www.usatoday.com/story/sports/fantasy/2014/07/14/draft-kings-draft-street-acquisition/12640959/> (last updated July 14, 2014).

<sup>64</sup> See Tom Huddleston, Jr., *Fantasy sports site FanDuel is now worth over \$1 billion*, FORTUNE, <http://fortune.com/2015/07/14/fanduel-funding-billion/> (last updated July 14, 2015); see also Dan Primack, *Sorry ESPN, But Kings and FanDuel Didn't Implode*, FORTUNE (Aug. 24, 2016), <http://fortune.com/2016/08/24/sorry-espn-but-draftkings-and-fanduel-didnt-implode/> (comparing the success of the venture capital market funding rounds of DraftKings with those of the ride hailing app, Uber, to explain why a loss in money does not signify a company's implosion).

<sup>65</sup> Heitner, *supra* note 18.

<sup>66</sup> Nathaniel J. Ehrman, *Out of Bounds?: A Legal Analysis of Pay-to-Play Daily Fantasy Sports*, 22 SPORTS LAW. J. 79, 85 (2015).

<sup>67</sup> Edelman, *supra* note 25, at 127. Three other common DFS contests are head-to-head,

day contest; this is one of the main differences between DFS contests and traditional fantasy sports games.<sup>68</sup> One of the most popular DFS contests that FanDuel and DraftKings offer is cash contests.<sup>69</sup> While player and competition selection are two unique differences between traditional and daily fantasy sports, the duration of the contest is the most prominent difference.<sup>70</sup> DFS leagues substantially reduce the time commitment involved with traditional fantasy sports leagues.<sup>71</sup> Where traditional fantasy sports leagues account for a player's statistical performances over a season, DFS leagues only track the statistical performance of a player during one game.<sup>72</sup> The timeframe difference between the duration of a traditional and daily fantasy contest is one of the main factors that instigates the debate of whether daily fantasy sports are a contest of skill or of chance.<sup>73</sup> These differences will be analyzed further in part VI.

### III. ECONOMIC IMPACT OF DAILY FANTASY SPORTS

DraftKings and FanDuel have partnered with three of the top major professional sports leagues in the United States: DraftKings has partnered with the MLB and FanDuel has partnered with the NHL and NBA.<sup>74</sup> Sports gambling is

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"Double-Ups," or Guaranteed Prize Pool (GPP). *See generally* Ehrman, *supra* note 66, at 86-88 (detailing how the length of a game and structure of a league influence an individual's decision to compete in a fantasy game).

<sup>68</sup> Ehrman, *supra* note 66, at 83.

<sup>69</sup> Jeffrey C. Meehan, Article, *The Predominate Goliath: Why Pay-to-Play Daily Fantasy Sports Are Games of Skill Under the Dominant Factor Test*, 26 MARQ. SPORTS L. REV. 5, 10-12 (2015). Cash games pay at least one-third of the entrants whereas tournaments typically only pay out the top 20% of the field. Once the participant has selected the game type, they are required to set a lineup with a set maximum salary cap. In a salary cap format, each player is designated a "price" relative to his fantasy value. After a participant sets their lineup, their lineup can be modified until the particular sports contest begins. Scoring and the participant's performance in DFS leagues are based on the statistical performances of the assembled players in the participant's lineup. Cash payouts are awarded depending on where the participant's overall scoring number for their lineup ranks among the other participants in the same contest. *Id.*

<sup>70</sup> Ehrman, *supra* note 66, at 86.

<sup>71</sup> Jonathan Bass, Comment, *Flushed from the Pocket: Daily Fantasy Sports Businesses Scramble Amidst Growing Legal Concerns*, 69 SMU L. REV. 501, 505 (2016) (comparing the time commitment involved in traditional fantasy sports play and daily fantasy sports play); *but see* Ehrman, *supra* note 66, at 103 (arguing that the flexibility involved in creating a daily fantasy sports team requires an adjustment in research and strategy, and therefore preparation laborious process).

<sup>72</sup> Bass, *supra* note 71, at 505.

<sup>73</sup> Ehrman, *supra* note 66, at 85-86.

<sup>74</sup> Chris Grove, *Three Of The Four Major American Sports Leagues Now Have Official Daily Fantasy Sports Partners*, LEGAL SPORTS REP. (Apr. 2, 2015),

at an all-time high – whether it's the NFL wagering to expand a team to Las Vegas where sports betting is legal,<sup>75</sup> the commissioner of the NBA endorsing the legalization of sports betting,<sup>76</sup> or even the \$149 billion that the American Gaming Association estimates was illegally bet on sports in 2015.<sup>77</sup> When DFS took off in 2009, approximately 28 million people were playing fantasy sports.<sup>78</sup> From 2003 to 2009, the fantasy sports industry saw an increase of approximately 13 million users, whereas from 2009 to 2015 the industry saw an increase of approximately 28 million users – more than doubling the industry size compared to before DFS existed.<sup>79</sup>

One way FanDuel and DraftKings attempt to capture new consumers into their industry is through advertising.<sup>80</sup> In 2015, DraftKings spent approximately \$156 million on TV commercials.<sup>81</sup> Right before the NFL season began, DraftKings was averaging a commercial every 90 seconds.<sup>82</sup> Advertising has not only attracted a new segment of the fantasy industry but it has also sparked many U.S. professional sports leagues forming partnerships with FanDuel and DraftKings.<sup>83</sup>

FanDuel has a partnership with the NBA and the NFL,<sup>84</sup> which gives the

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<http://www.legalsportsreport.com/840/mlb-daily-fantasy-partnership-draftkings/>.

<sup>75</sup> See Robert E. Goeller, Note, *The Money, Man, the Money: Sports Gambling in Professional and Amateur Sports*, 12 WILLAMETTE SPORTS L. J. 1, 21 (2015) (analyzing how federal regulations, the four major United States professional sports leagues, and fantasy sports have influenced the sports betting industry).

<sup>76</sup> See Daniel O'Leary & Mitch Abramson, *NBA commish Silver pens op-ed in favor of sports betting*, N.Y. DAILY NEWS, <http://www.nydailynews.com/sports/basketball/nba-commish-silver-pens-op-ed-favor-sports-betting-article-1.2010565> (last updated Nov. 14, 2014) (advocating for the legalization of sports gambling so long as the "integrity of game" is protected).

<sup>77</sup> See Grossman, *supra* note 19.

<sup>78</sup> See FSTA *Industry Demographics*, *supra* note 41.

<sup>79</sup> *Id.* In 2016, over 57 million people are captivated in the industry; see *Id.*

<sup>80</sup> Curt Woodward, *Now a household name, DraftKings unlikely to repeat ad blitz*, THE BOSTON GLOBE (Jan. 18, 2016), <https://www.bostonglobe.com/business/2016/01/18/draftkings-considers-lighter-spending-after-huge-buys/07d7NhKZkAQFlrHSQE5XhK/story.html>.

<sup>81</sup> Myles Udland, *Fantasy sports companies spend so much on commercials they're moving the needle on TV ad spending*, BUSINESS INSIDER (Oct. 6, 2015, 2:56 PM), <http://www.businessinsider.com/draftkings-fanduel-daily-fantasy-sports-advertising-2015-10>.

<sup>82</sup> *Id.*

<sup>83</sup> See Schrottenboer, *supra* note 13.

<sup>84</sup> Brent Schrottenboer, *FanDuel signs deals with 15 NFL teams escalating daily fantasy integration*, USA TODAY (Apr. 21, 2015, 10:42 AM), <http://www.usatoday.com/story/sports/2015/04/21/daily-fantasy-sports-fanduel-draftkings-nfl-mlb-nhl-nba/26149961/>.

NBA to have an equity stake in FanDuel; FanDuel also has a partnership with thirteen NBA teams, which in turn help market and promote FanDuel's product.<sup>85</sup> FanDuel's partnership with the NFL allows the league to promote stadium signage, digital advertising and other promotions for FanDuel.<sup>86</sup>

FanDuel's rival, DraftKings, has partnered with the MLB and the NHL.<sup>87</sup> DraftKings also has investments with Fox Sports and Madison Square Garden whereas NBC Sports and Time Warner's Turner Sports invest in FanDuel.<sup>88</sup> Recently DraftKings and FanDuel agreed to a merger that will alleviate lobbying and legal costs that have started to affect both companies' bottom lines.<sup>89</sup> Regulators still need to approve the merger but both companies expect the deal to be completed in the second half of 2017.<sup>90</sup>

While DFS has undoubtedly and positively impacted multiple professional sports leagues, critics of DFS assert that the game violates federal or state laws.<sup>91</sup> The next section will analyze DFS under federal and state law, to illustrate how states across the country view the legality of DFS.

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<sup>85</sup> Darren Heitner, *FanDuel Signs Multi-Year Partnerships With 13 NBA Teams*, FORBES (Jun. 23, 2015, 8:54 AM), <http://www.forbes.com/sites/darrenheitner/2015/06/23/fanduel-signs-multi-year-partnerships-with-13-nba-teams/#774906ee4ab3>.

<sup>86</sup> Ron Clements, *FanDuel partners with nearly half of NFL teams*, SPORTING NEWS (Apr. 22, 2015), <http://www.sportingnews.com/nfl/news/4642357-fanduel-daily-fantasy-sports-teams-up-with-half-nfl-teams-dfs>. The NFL has placed restrictions on the partnership with FanDuel that include: (1) disallowing NFL team logos to appear in FanDuel advertisements or website and (2) FanDuel will not be an official NFL or team sponsor. *See generally* Schrottenboer, *supra* note 84.

<sup>87</sup> Grove, *supra* note 74.

<sup>88</sup> Drew Harwell, *The rise of daily fantasy sports, online betting's newest empire*, WASH. POST (Jul. 28, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/07/28/how-daily-fantasy-sites-became-pro-sports-newest-addiction-machine/>.

<sup>89</sup> Joe Drape, *DraftKings and FanDuel Agree to Merge Daily Fantasy Sports Operations*, N.Y. TIMES (Nov. 18, 2016), <http://www.nytimes.com/2016/11/19/sports/draftkings-fanduel-merger-fantasy-sports.html>. The merger agreement will "accelerate [the] path to profitability" especially after both companies agreed to the \$12 million settlement over false advertising claims with the New York Attorney General in earlier this year. *See* Reuters, *Here's How the DraftKings and FanDuel Merger will Play Out*, FORTUNE (Nov. 18, 2016, 10:35 AM), <http://fortune.com/2016/11/18/fantasy-sports-draftkings-fanduel/>.

<sup>90</sup> Drape, *supra* note 89.

<sup>91</sup> Don Van Natta Jr., *Welcome to the Big Time*, ESPN (Aug. 24, 2016), [http://www.espn.com/espn/feature/story/\\_/id/17374929/otl-investigates-implosion-daily-fantasy-sports-leaders-draftkings-fanduel](http://www.espn.com/espn/feature/story/_/id/17374929/otl-investigates-implosion-daily-fantasy-sports-leaders-draftkings-fanduel).

## IV. DAILY FANTASY SPORTS UNDER FEDERAL GAMBLING LAW

## A. Unlawful Internet Gambling Enforcement Act

The Unlawful Internet Gambling Enforcement Act (“UIGEA”) was passed in 2006 to regulate internet gambling.<sup>92</sup> An exemption for fantasy sports was included in the UIGEA which makes traditional season-long fantasy sports games legal if the “winning outcomes reflect the relative knowledge and skill of the participants.”<sup>93</sup> The “UIGEA specifically illustrates that a “bet or wager” does not include certain activities, including:

The participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization (as those terms are defined in section 3701 of title 28) and that meets the following conditions:

(I) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants.

(II) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.

(III) No winning outcome is based—

(aa) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or

(bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.<sup>94</sup>

This “fantasy sports carve-out” provision in the UIGEA indicates the first time Congress has made an exemption for fantasy sports in any federal anti-gambling statute.<sup>95</sup> The UIGEA applies to traditional fantasy sports but it does not explicitly mention the term “daily fantasy sports” – anywhere.<sup>96</sup> When the UIGEA was passed daily fantasy sports did not exist.<sup>97</sup> Nonetheless, the author of the UIGEA, Jim Leach, recently stated that he never intended for the fantasy

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<sup>92</sup> 31 U.S.C. § 5361.

<sup>93</sup> § 5362(1)(E)(ix)(II).

<sup>94</sup> § 5362(1)(E)(ix)(I)-(III)(aa)(bb).

<sup>95</sup> Ehrman, *supra* note 66, at 94.

<sup>96</sup> 31 U.S.C. §§ 5361-5367.

<sup>97</sup> Adam Kilgore, *DraftKings, FanDuel could face first significant legal challenge after hearing request*, WASH. POST (Sept. 14, 2015), [https://www.washingtonpost.com/news/sports/wp/2015/09/14/draftkings-fanduel-could-face-first-significant-legal-challenge-after-hearing-request/?utm\\_term=.d9c7aaa3aa20](https://www.washingtonpost.com/news/sports/wp/2015/09/14/draftkings-fanduel-could-face-first-significant-legal-challenge-after-hearing-request/?utm_term=.d9c7aaa3aa20).

exception to include daily fantasy games.<sup>98</sup> Leach expressed his desire that “fantasy sports would be a ‘*de minimus*’ footnote” and stated that “no one ever conceived of it becoming a large scale activity or that it could transition into a one-day contest.”<sup>99</sup> Furthermore, the UIGEA’s fantasy sports carve-out is vague and broad.<sup>100</sup> The most problematic section of the UIGEA’s fantasy sports carve-out provision is 31 U.S.C. § 5362(1)(E)(ix)(II).<sup>101</sup> This section is troublesome for two reasons: (1) each state has a different gambling test to determine how skill is calculated and (2) there have been no judicial opinions on this provision.<sup>102</sup> While the wording of UIGEA’s fantasy provision is considered by some to be broad, others also criticize the congressional origin of the UIGEA fantasy sports carve out provision and question why it even exists in the first place.<sup>103</sup>

Although the UIGEA was passed in 2006, the idea of legislation exempting fantasy sports games from being constituted as illegal online gambling was originally presented in 1998.<sup>104</sup> The amendment proposed by Senator Richard Bryan of Nevada included many of the same elements found in the UIGEA including the concept that fantasy sports leagues could charge administrative fees.<sup>105</sup> When the UIGEA passed there was very little chatter about any kind of dismay towards the UIGEA.<sup>106</sup>

## V. DAILY FANTASY SPORTS UNDER STATE GAMBLING LAW

### A. General Overview

Currently, thirty-nine states allow DraftKings and FanDuel to offer the paid

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<sup>98</sup> Brian Pempus, *UIGEA Author Not Happy About Daily Fantasy Sports*, CARDPLAYER (May 14, 2015), <http://www.cardplayer.com/poker-news/18801-uigea-author-not-too-happy-about-daily-fantasy-sports>.

<sup>99</sup> John Israel & Sacha Feinman, *The Hot New Form of Fantasy Sports Is Probably Addictive, Potentially Illegal and Completely Unregulated*, THINKPROGRESS (May 7, 2015), <https://thinkprogress.org/the-hot-new-form-of-fantasy-sports-is-probably-addictive-potentially-illegal-and-completely-4c90c89db63b#.hmqw8wr0y>.

<sup>100</sup> Darren Heitner, *Congress Wisely Puts Legal Status of Fantasy Sports Under Review*, FORBES (Sept. 15, 2015, 8:05 AM), <http://www.forbes.com/sites/darrenheitner/2015/09/15/congress-wisely-puts-legal-status-of-fantasy-sports-under-review/#6092f6495eab>.

<sup>101</sup> *Id.*; see generally 31 U.S.C. § 5363(1)(E)(ii).

<sup>102</sup> Heitner, *supra* note 100.

<sup>103</sup> Rodenberg, *supra* note 17.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

daily fantasy sports contests to their residents.<sup>107</sup> The Tenth Amendment to the United States Constitution allows states to determine whether an activity is illegal gambling.<sup>108</sup> Even though an exemption under the UIGEA allows pay-to-play fantasy sports to operate under federal law, state regulations can prohibit the practice.<sup>109</sup> The verb “gamble” is defined in the *Merriam-Webster Online Dictionary* as “to play a game for money or property,” or “to bet on an uncertain outcome.”<sup>110</sup> An activity is considered illegal gambling only if it meets three state-specific factors: consideration, reward, and chance.<sup>111</sup> DFS contests meet the legal definitions of consideration and reward respectively, as DFS contests require its participants to pay money to enter into the contests and have the potential to receive a monetary prize.<sup>112</sup> Therefore under state law, the legality of DFS contests depends on whether the contest involves “skill” or “chance.”<sup>113</sup> A game of skill is one where “consideration is paid by a person in exchange for the opportunity to win a prize resulting from the outcome of a contest of skill” whereas a game of chance is one that is “the opposite of something that is planned or designed.”<sup>114</sup>

States have developed three different tests to determine between whether a gambling activity is skill-based or chance-based: (1) the Dominant Factor Test; (2) the Material Element Test; and (3) the Any Chance Test.<sup>115</sup> The majority of states use the common law Dominant Factor Test, also known as the “Predom-

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<sup>107</sup> Roberts, *supra* note 20. These states include: Alaska; Arkansas; California; Colorado; Connecticut; Florida; Georgia; Illinois; Indiana; Kansas; Kentucky; Maine; Maryland; Massachusetts; Michigan; Minnesota; Mississippi; Missouri; Nebraska; New Hampshire; New Jersey; New Mexico; New York; North Carolina; North Dakota; Ohio; Oklahoma; Oregon; Pennsylvania; Rhode Island; South Carolina; South Dakota; Tennessee; Utah; Vermont, Virginia; West Virginia; Wisconsin; Wyoming; and Washington, D.C.. *Id.*

<sup>108</sup> See U.S. CONST. amend X.

<sup>109</sup> Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 J. MARSHALL L. REV. 1195, 1202 (2007) (analyzing fantasy sports under state law instead of federal is a more efficient approach for two reasons: (1) the purpose of federal gambling laws are to help states enact their own state gambling laws and (2) state laws usually include material addressing the underlying framework of federal laws).

<sup>110</sup> *Gamble Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/gamble> (last visited Jan. 27, 2017).

<sup>111</sup> Edelman, *supra* note 25, at 131.

<sup>112</sup> Meehan, *supra* note 69, at 15.

<sup>113</sup> *Id.* at 10 (a contest that labeled as a game of skill is legal whereas a contest that is labeled a game of chance is illegal).

<sup>114</sup> Anthony N. Cabot et. al., Article, *Alex Rodriguez, A Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance*, 57 DRAKE L. REV. 383, 394-95 (2009).

<sup>115</sup> Meehan, *supra* note 69, at 15.



inance Test.”<sup>116</sup> An activity under the Predominance Test will be classified as a game of skill “if a player’s own ability controls at least 51% of a contest’s outcome.”<sup>117</sup> A minority of states apply the Material Element Test,<sup>118</sup> which states that an activity can be classified as involving 51% skill but still be labeled as a game of chance if “chance is a material element affecting the outcome of the game.”<sup>119</sup> Under the Material Element Test, games of skill could be classified as games of chance, even when skill is the main factor. Thus, his type of test is subject to a higher level of criticism than the Predominant Factor Test.<sup>120</sup> The Any Chance Test, adopted only by a few states,<sup>121</sup> determines chance in an activity if “chance plays any role in influencing the outcome of a game.”<sup>122</sup> Therefore, a game will be considered illegal, if the outcome might be influenced by the smallest possibility of chance.<sup>123</sup> In states that apply the Any Chance Test, DFS contests would be considered illegal gambling because fantasy sports games involve some element of chance, such as weather conditions and player injuries, which the participant of the DFS contest cannot control.<sup>124</sup> In these jurisdictions, even chess would be considered a game of chance and thus illegal gambling, because the player who moves their piece first will have a higher percentage of winning the game.<sup>125</sup> States that adhere to this strict test include Arizona, Iowa, and Louisiana.<sup>126</sup>

#### B. States Where DraftKings and FanDuel both Operate

A New Jersey federal court decision, *Humphrey v. Viacom*, helped support the majority view that DFS contests include some skill.<sup>127</sup> The plaintiff claimed

<sup>116</sup> *Id.* at 16.

<sup>117</sup> Cabot & Csoka, *supra* note 109, at 1204; *see generally* Chuck Humphrey, *State Gambling Law Summary* (Dec. 1, 2016), <http://www.gambling-law-us.com/State-Law-Summary/> (describing the different gambling tests used in different state jurisdictions).

<sup>118</sup> Meehan, *supra* note 69, at 15.

<sup>119</sup> Edelman, *supra* note 25, at 134.

<sup>120</sup> *See, e.g.*, Erica Okerberg, *What’s in a Game? A Test Under Which We May Call a ‘Vgt’ a Gambling Game Is Not So Sweet: Why Courts Should Not Apply the Material Element Test to Vgts*, 5 UNIV. OF NEV. L.V. GAMING L. J. 27, 29-31 (2014); *see also* United States v. DiCristina, 726 F.3d 92, 98 (2d Cir. 2013) (holding that in New York a contest is a game of chance if the outcome depends “in a material degree upon an element of chance,” even though skill may also be a factor).

<sup>121</sup> Meehan, *supra* note 69, at 15.

<sup>122</sup> *Id.*

<sup>123</sup> Edelman, *supra* note 25, at 120, 134-35.

<sup>124</sup> Meehan, *supra* note 69, at 15.

<sup>125</sup> *Id.*; *see generally* JONATHAN ROWSON, *CHess FOR ZEBRAS: THINKING DIFFERENTLY ABOUT BLACK AND WHITE* 193 (2003).

<sup>126</sup> Edelman, *supra* note 25, at 120, 134-35.

<sup>127</sup> Steven J. Daroci, *Fantasy Sports or Gambling? The Difference “Skill” Makes*, GAR-

that: (1) the entry fees paid by fantasy league participants are “wagers” or “bets;” and (2) the winners are determined predominantly by chance.<sup>128</sup> The U.S. District Court for the District of New Jersey rejected the plaintiff’s argument stating that: “the success of a fantasy sports team depends on the participants’ skill in selecting players for his or her team, trading players over the course of the season, . . . and deciding who among his or her players will start and which players will be placed on the bench.”<sup>129</sup>

Colorado was able to pass a bill legalizing DFS by providing several regulations and consumer protections in the legislation, which included: (1) having the Division of Professions and Occupations oversee the DFS industry; (2) setting licensing and renewal fees; (3) establishing annual audits for large operators; (4) prohibiting contests involving college sporting events; (5) setting a minimum age of 18 for all DFS users; and (6) including various consumer protections.<sup>130</sup>

Indiana’s bill, which legalized DFS, emphasized that fantasy sports are a game of skill.<sup>131</sup> Legislation in Massachusetts legalizing DFS contests followed along the same reasoning as Indiana because Massachusetts also defines fantasy sports as a skill-based game.<sup>132</sup> West Virginia and Rhode Island also state that DFS do not constitute a game of chance.<sup>133</sup> Rhode Island reached their conclusion by applying the dominant factor test and West Virginia stated that DFS is not a game decided predominantly by chance.<sup>134</sup>

States such as Kansas, Mississippi, and Tennessee faced previous legislation

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DEN STATE GAVEL (Mar. 27, 2015), <https://njlitigationlaw.foxrothschild.com/business-law/fantasy-sports-or-gambling-the-difference-skill-makes/>.

<sup>128</sup> *Humphrey v. Viacom, Inc.*, No. 06-2768 DMC, 2007 WL 1797648 at \*2 (D.N.J. June 20, 2007).

<sup>129</sup> *Id.*

<sup>130</sup> Dustin Gouker, *Colorado Becomes Fifth State to Enact Fantasy Sports Law in 2016*, LEGAL SPORTS REP. (June 10, 2016), <http://www.legalsportsreport.com/10414/colorado-fantasy-sports-law-enacted/>.

<sup>131</sup> Mark Alesia, *Pence signs bill legalizing daily fantasy*, INDYSTAR (Mar. 24 2016), <http://www.indystar.com/story/sports/2016/03/24/daily-fantasy-sports-law-fanduel-draftkings-mike-pence/82205488/> (comparing Colorado’s pro-DFS legislation to Indiana’s bill passing DFS, which also included provision for consumer protections, annual audits, minimum age of 18 requirement, oversight of the industry, and renewal and licensing fees).

<sup>132</sup> Shira Schoenberg, *New law ensures daily fantasy sports remains legal in Massachusetts*, MASSLIVE (Aug. 10, 2016, 4:36 PM), [http://www.masslive.com/politics/index.ssf/2016/08/new\\_law\\_ensures\\_daily\\_fantasy.html](http://www.masslive.com/politics/index.ssf/2016/08/new_law_ensures_daily_fantasy.html).

<sup>133</sup> Ryan Rodenberg, *Daily fantasy sports state-by-state tracker*, ESPN (Aug. 27, 2016), [http://www.espn.com/chalk/story/\\_/id/14799449/daily-fantasy-dfs-legalization-tracker-all-50-states](http://www.espn.com/chalk/story/_/id/14799449/daily-fantasy-dfs-legalization-tracker-all-50-states).

<sup>134</sup> *Id.*

and opposition regarding the legality of DFS.<sup>135</sup> Legislation in 2015 officially legalized DFS in Kansas despite the Kansas Racing and Gaming Commission stating that DFS contests constituted an illegal lottery.<sup>136</sup> In Mississippi and Tennessee, new legislation legalizing DFS contests overruled previous opinion letters by Attorney Generals in both states which previously depicted DFS as violating their state gambling laws.<sup>137</sup>

Ohio, which currently allows DFS contests in their state, has pending legislation that might affect the legality of the contests.<sup>138</sup> The Ohio legislature introduced new legislation calling DFS a “scheme of chance.”<sup>139</sup> If this new legislative proposal were passed, any contest that doesn’t return 100% of entry fees to the contest’s participants would be illegal.<sup>140</sup>

#### *i. New York Supreme Court Legalizes Daily Fantasy Sports*

New York is home to FanDuel’s headquarters and the state accounts for 12.8% of the DFS contestants in the United States, which is the largest contingent of any state.<sup>141</sup> In November 2015, the Attorney General of New York, Eric Schneiderman, mandated that FanDuel and DraftKings cease its services to residents in New York.<sup>142</sup> Schneiderman concluded, “each DraftKings/FanDuel wager represents a wager on a ‘contest of chance’ where

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<sup>135</sup> *Id.*

<sup>136</sup> Dustin Gouker, *Game On In Kansas: State Officially Legalizes Fantasy Sports*, LEGAL SPORTS REP. (May 19, 2015, 4:08 PM), <http://www.legalsportsreport.com/1493/kansas-legalizes-fantasy-sports/>. This Commission had the opinion that “chance predominates over skill in fantasy sports because chance exists in whether a player is injured and whether the actual team’s gameplay for a particular changes on a weekly basis. See Edelman, *supra* note 25, at 133.

<sup>137</sup> See generally Rodenberg, *supra* note 133.

<sup>138</sup> Bowdeya Tweh, *Coley: Some daily fantasy sports games break Ohio law*, CINCINNATI.COM (Sept. 26, 2016, 6:49 PM), <http://www.cincinnati.com/story/money/2016/09/26/coley-some-daily-fantasy-sports-games-break-ohio-law/91118770/>.

<sup>139</sup> Kevin P. Braig, *SB356: Senator Coley Proposes Daily Fantasy Sports Contest Legislation*, SHUMAKER SPORTS REP. (Sept. 26, 2016), <https://shumakersportsreport.com/2016/09/26/sb356-senator-coley-proposes-daily-fantasy-sports-contest-legislation/>.

<sup>140</sup> Dustin Gouker, *Ohio’s New Daily Fantasy Sports Bill, And Why Framing Matters At The State Level*, LEGAL SPORTS REP. (Sept. 27, 2016, 2:37 PM), <http://www.legalsportsreport.com/11679/ohio-daily-fantasy-sports-and-framing/>.

<sup>141</sup> Sharon Terlep, *Appeals Court Lets DraftKings, FanDuel Continue in New York*, WALL. ST. J. (Dec. 11, 2015, 5:21 PM), <http://www.wsj.com/articles/new-york-court-orders-draftkings-fanduel-to-cease-operating-in-state-1449850556>.

<sup>142</sup> Darren Rovell, *New York attorney general amends lawsuit against daily fantasy sites*, ESPN (Jan. 2, 2016), [http://www.espn.com/chalk/story/\\_/id/14458955/new-york-attorney-general-wants-draftkings-fanduel-return-profits](http://www.espn.com/chalk/story/_/id/14458955/new-york-attorney-general-wants-draftkings-fanduel-return-profits).

winning or losing depends on numerous elements of chance to a ‘material degree.’<sup>143</sup> Following the cease order, DraftKings and FanDuel filed lawsuits against the state of New York, alleging that DFS is a game of skill.<sup>144</sup> In order to prevail, both DFS companies had to prove that their contests did not involve a “material degree” of chance.<sup>145</sup> The New York Supreme Court agreed with Schneiderman and subsequently prevented DraftKings and FanDuel from “accepting entry fees, wagers or bets from New York consumers.”<sup>146</sup> In August 2016, the Governor of New York, Andrew Cuomo, passed legislation permitting DFS contests in New York and overruled the litigation that Schneiderman was asserting.<sup>147</sup> A New York State Senator applauded Cuomo’s legislative efforts to legalize DFS stating, “With strong consumer protections and economic benefits to the state, I believe this legislation can serve as a model for the rest of the country.”<sup>148</sup>

## ii. Daily Fantasy Sports Battle for Legality in Illinois

The Attorney General of Illinois, Lisa Madigan, issued an opinion in December of 2015, asserting that DFS contests were illegal gambling.<sup>149</sup> Madigan supported her decision by stating that “the players do not have any control or influence to determine the outcome of the game.”<sup>150</sup> Another politician in Illi-

<sup>143</sup> David Purdum & Darren Rovell, *N.Y. AG declares DraftKings, FanDuel are illegal gambling, not fantasy*, ESPN (Nov. 11, 2015), [http://www.espn.com/chalk/story/\\_/id/14100780/new-york-attorney-general-declares-daily-fantasy-sports-gambling](http://www.espn.com/chalk/story/_/id/14100780/new-york-attorney-general-declares-daily-fantasy-sports-gambling).

<sup>144</sup> Mark Lelinwalla, *DraftKings and FanDuel File Lawsuits Against New York State To Stay Open*, TECHTIMES (Nov. 15, 2015, 4:01 PM), <http://www.techtimes.com/articles/106542/20151113/draftkings-fanduel-file-lawsuits-against-new-york-state-stay-open.htm>.

<sup>145</sup> Daniel Roberts, *FanDuel, DraftKings file lawsuits against NY Attorney General*, FORTUNE (Nov. 13, 2015, 4:20 PM), <http://fortune.com/2015/11/13/fanduel-draftkings-lawsuits-schneiderman/>.

<sup>146</sup> *The People of the State of New York v. Fanduel, Inc.*, No. 32332(U), slip op. 1,10 (N.Y. Sup. Ct. Dec. 11, 2015).

<sup>147</sup> See Dustin Gouker, *Daily Fantasy Sports Is Back In Business In New York: Gov. Cuomo Signs Bill*, LEGAL SPORTS REPORT (August 3, 2016 4:53 PM), <http://www.legalsportsreport.com/10890/ny-enacts-dfs-law/>.

<sup>148</sup> Dustin Goeker, *Daily Fantasy Sports Is Back In Business In New York: Gov. Cuomo Signs Bill*, LEGAL SPORTS REP. (Aug. 3, 2016, 4:53 PM), <http://www.legalsportsreport.com/10890/ny-enacts-dfs-law/>.

<sup>149</sup> Carlos Sadovi, *Attorney general: Daily sports fantasy betting illegal under Illinois Law*, CHICAGO TRIBUNE (Dec. 23, 2015, 11:18 PM), <http://www.chicagotribune.com/news/local/breaking/ct-madigan-daily-fantasy-betting-is-illegal-gambling-20151223-story.html>.

<sup>150</sup> *Id.*

nois, state Republican Mike Zalewski, introduced a bill in October of 2015, attempting to legalize betting in fantasy league contests on the premise that: “[c]onstituents of ours play these games . . . we’re faced with the choice of deciding whether we want to protect them from the reality we know exists and make sure that they enjoy the games in a reasonable way.”<sup>151</sup> To date, despite conflicting viewpoints on DFS in the state, a bill to legalize DFS has not been passed but is slated for the current legislative session.<sup>152</sup> Nonetheless, while the bill is on hold, FanDuel filed its lawsuit (*FanDuel, Inc. v. Madigan*) with Head2Head Sports, a fantasy sports operator, asking the court for an expedited opinion stating that fantasy games do not constitute gambling under Illinois law.<sup>153</sup> Illinois law permits prize oriented fantasy contests as long as they are based on skill.<sup>154</sup>

### C. States Where DraftKings and FanDuel Cannot Operate

Currently, ten states do not allow Draft Kings and FanDuel to offer their paid contests to residents.<sup>155</sup> Five of these states: Alabama, Delaware, Hawaii, Idaho, and Nevada, have introduced bills attempting to legalize DFS contests but have faced contested legislation denying their efforts.<sup>156</sup> The other five states: Arizona, Iowa, Louisiana, Montana, and Washington have historically banned any kind of online fantasy sports contests.<sup>157</sup>

#### *i. Recently Contested States Agree that DFS Contests are Based on Chance, Making them Illegal under State Gambling Laws*

Under Alabama, Delaware, Hawaii, Idaho, and Nevada state laws, DFS contests constitute illegal gambling because participants risk money based on fu-

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<sup>151</sup> Ivan Moreno, *Illinois weighs legalization of daily fantasy sports betting*, CHICAGO SUN TIMES (Apr. 20, 2016), <http://chicago.suntimes.com/news/illinois-fantasy-sports-betting/>.

<sup>152</sup> Dustin Gouker, *Illinois Daily Fantasy Sports Bill Dead For Now; Focus Returns To DraftKings, FanDuel Lawsuits*, LEGAL SPORTS REP. (May 29, 2016, 7:24 PM), <http://www.legalsportsreport.com/10224/illinois-dfs-bill-tabled/>.

<sup>153</sup> Associated Press, *DraftKings, FanDuel file lawsuits against Illinois attorney general*, CHICAGO TRIBUNE (Dec. 24, 2015, 9:43 PM), <http://www.chicagotribune.com/news/local/breaking/ct-draftkings-lawsuit-illinois-lisa-madigan-20151224-story.html>.

<sup>154</sup> *See Id.*. FanDuel contends the entry fees to enter the fantasy contests are not bets or wager. *See generally* *Fanduel, Inc. v. Madigan*, No. 15 MR 1136 (Ill. Cir. Ct. Mar. 16, 2016).

<sup>155</sup> *See* Roberts, *supra* note 20.

<sup>156</sup> *See* Rodenberg, *supra* note 133.

<sup>157</sup> *Id.*

ture contingent sporting events, thus making it a contest based on chance rather than skill.<sup>158</sup> These five states are all in agreement that outside factors that are not under the control of the fantasy participant are elements of chance, not skill, which makes the contest illegal under state gambling laws. Alabama Attorney General Luther Strange stated that there is “a measure of skill involved in creating a fantasy roster,” but cited that “contestants have no control over the performance of the players on their rosters . . . [t]hus the results of paid daily fantasy sports contests depend to a large degree on chance.”<sup>159</sup> The Delaware Department of Justice cited no skill involved in fantasy sports, thus prohibiting FanDuel and DraftKings to operate their paid DFS contests in the state.<sup>160</sup> In Hawaii’s Attorney General Doug Chin’s formal opinion asserting DFS is gambling under state law, he differentiated DFS contests from traditional fantasy contests by noting how DFS contests involve a large number of contestants and amount of money.<sup>161</sup> Idaho sees DFS contests as activities in which participants pay money for a cash prize based on the performance of athletes in future sporting events.<sup>162</sup> Although DraftKings and FanDuel are prohibited from operating in Delaware and Idaho, both states allow the DFS companies to offer free fantasy sports contests for prizes to their state residents.<sup>163</sup>

*ii. DraftKings and FanDuel Attempt to Re-Enter Nevada*

In Nevada, the state Attorney General stated that DFS contests are illegal gambling because the paid contests meet specific Nevada state law criteria that

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<sup>158</sup> *Id.*

<sup>159</sup> Dustin Gouker, *Alabama Attorney General Tells DraftKings, FanDuel To Cease And Desist*, LEGAL SPORTS REP. (Apr. 6, 2016), <http://www.legalsportsreport.com/9441/alabama-ag-says-dfs-is-illegal/> (illustrating Strange’s point by saying that certain factors such as “a player could fall ill before a game, be injured in pre-game warm-ups, or miss a large portion of the game due to injury or equipment failure,” are outside the control of a fantasy sports participant”).

<sup>160</sup> Jessica Masulli Reyes, *Delaware puts an end to fantasy sports betting*, DELAWARE-ONLINE, <http://www.delawareonline.com/story/news/local/2016/07/08/delaware-puts-end-fantasy-sports-betting/86870566/>.

<sup>161</sup> Tajha Chappellet-Lanier, *A Blow to Daily Fantasy Sports in Hawaii*, THE ATLANTIC (Jan. 28, 2016), <http://www.theatlantic.com/politics/archive/2016/01/hawaii-might-bid-daily-fantasy-sports-aloha/433809/>.

<sup>162</sup> George Prentice, *Idaho AG Strikes Landmark Fantasy Sports Agreement With DraftKings and FanDuel*, BOISE WEEKLY (May 2, 2016), <http://www.boiseweekly.com/boise/idaho-ag-strikes-landmark-fantasy-sports-agreement-with-draftkings-and-fanduel/Content?oid=3780916>.

<sup>163</sup> Reyes, *supra* note 160; *see also* Prentice, *supra* note 162.

signal illegal gambling activity.<sup>164</sup> Nevada does not allow DFS operators to provide contests in its state for four reasons: (1) DFS contests meet the requirements for a “sports pool;”<sup>165</sup> (2) the amount of skill required for DFS is irrelevant; (3) the UIGEA does not legalize DFS; and (4) DraftKings uses “betting terms.”<sup>166, 167</sup> Despite the strict gaming rules in Nevada, DraftKings and FanDuel proposed legislation in August 2016 to re-enter Nevada.<sup>168</sup> The legislation proposes four main regulations on DFS contests: (1) oversight and regulation from Nevada Gaming Commission and Nevada Gaming Control Board; (2) DFS is no longer associated with the definition of “sports pool,” “gambling game” and “lottery” under state law; (3) consumer protections; and (4) a licensing fee.<sup>169</sup> This proposed legislation has faced high criticism from policy-makers stemming from their skepticism over regulations and weak punishments.<sup>170</sup> The Nevada Gaming Commission Chairman Tony Alamo expressed his desire for daily fantasy sports, but stated that “Nevada is the gold standard ... there’s just not an appetite for ‘regulation light’ or ‘regulation not at all.’”<sup>171</sup> The committee that rejected the newly proposed legislation for DFS said they were disappointed that the proposal excluded background checks since the Nevada casino industry works diligently to prevent associations to organize crime.<sup>172</sup>

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<sup>164</sup> Chris Grove, *Nevada Gaming Says Daily Fantasy Sports Is Gambling Under State Law, Illegal To Offer Without State License*, LEGAL SPORTS REP. (Oct. 15, 2015), <http://www.legalsportsreport.com/5173/nevada-says-dfs-is-gambling/>.

<sup>165</sup> *Id.* (describing that an operation of a sport meets the following three requirements: “(1) whether a wager is present; (2) whether the wagering is done on sporting events or other events by any system or method of wagering; and (3) whether daily fantasy sports operators are in ‘the business’ of accepting wagers.”).

<sup>166</sup> *Id.* (noting that the CEO of DraftKings, Jason Robins, previously stated that the concept for DraftKings was “almost identical to a casino.”).

<sup>167</sup> *Id.*

<sup>168</sup> Daniel Rothberg, *Daily fantasy sports could make a comeback in Nevada*, LAS VEGAS SUN (Aug. 23, 2016), <http://lasvegassun.com/news/2016/aug/23/daily-fantasy-sports-could-make-a-comeback-in-neva/>.

<sup>169</sup> Dustin Gouker, *DraftKings, FanDuel Offer Nevada Fantasy Sports Legislation Ahead Of Key Meeting*, LEGAL SPORTS REP. (Aug. 17, 2016), <http://www.legalsportsreport.com/11068/nevada-dfs-legislation/>.

<sup>170</sup> Rothberg, *supra* note 168.

<sup>171</sup> Associated Press, *Daily fantasy sports sites aim to make Nevada comeback*, FOX BUS. (Aug. 23, 2016), <http://www.foxbusiness.com/markets/2016/08/23/daily-fantasy-sports-sites-aim-to-make-nevada-comeback.html>.

<sup>172</sup> *Id.*

### iii. Historically Banned States

#### 1. Iowa

Iowa has longed banned cash payouts from fantasy contests, but legislation was introduced in April 2016 to legalize fantasy sports wagering.<sup>173</sup> The legislation was originally approved by state lawmakers, among whom Senator Bill Dotzler commented, supporting the legalization of paid fantasy sports contests: “It’s my view that fantasy sports betting is a cultural and social phenomenon that is growing in this country, and it is occurring in Iowa whether we like it or not.”<sup>174</sup> Despite the positive feedback, the legislation was shut down by the Governor of Iowa, who expressed concern about possible ramifications and the many unanswered questions regarding violations.<sup>175</sup>

#### 2. Louisiana

Louisiana, like Iowa, declared in a 1991 opinion by their Attorney General that any fantasy sports contest is illegal where “a cost is incurred by participants.”<sup>176</sup> In May 2016, then Louisiana State Representative Joe Lopinto (R), introduced a bill that aimed to create a carve-out in state law by differentiating fantasy sports from gambling, despite Louisiana having “one of the strictest anti-gambling by computer statutes in the United States.”<sup>177</sup> The legislation encountered heavy opposition from lobbying groups who cited to FanDuel’s website, which states: “residents of . . . Louisiana . . . may only play in free contests.”<sup>178</sup>

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<sup>173</sup> William Petroski, *Fantasy sports bill dead in Iowa Senate*, DES MOINES REG. (Apr. 19, 2016, 5:42 PM), <http://www.desmoinesregister.com/story/news/politics/2016/04/19/fantasy-sports-bill-dead-iowa-senate/83251776/>.

<sup>174</sup> Erin Murphy, *Iowa makes new effort to legalize daily fantasy sports betting*, THE GAZETTE (Apr. 13, 2016, 7:00 PM), <http://www.thegazette.com/subject/news/government/iowa-makes-new-effort-to-legalize-daily-fantasy-sports-betting-20160413>.

<sup>175</sup> Petroski, *supra* note 173.

<sup>176</sup> Emily Lane, *The reality of fantasy sports? It’s illegal in Louisiana when states are involved*, NOLA.COM (Apr. 20, 2015, 1:42 PM), [http://www.nola.com/politics/index.ssf/2015/04/fantasy\\_football\\_illegal\\_louis.html](http://www.nola.com/politics/index.ssf/2015/04/fantasy_football_illegal_louis.html) (describing a Louisiana resident who won a prize on FanDuel but was denied a T-Shirt because of Louisiana’s stance of fantasy sports wagering).

<sup>177</sup> *Id.* (noting that the bill was assigned to the same committee that denied a 2010 bill that attempted to legalize fantasy sports in Louisiana).

<sup>178</sup> *Id.* (discussing Louisiana’s position that any form of online gambling is illegal. Fami-



### 3. Montana

DraftKings and FanDuel do not operate in Montana because it's one of the few states that adopted the Any Chance Test, which subsequently outlaws all forms of commercial online gambling.<sup>179</sup> Under Montana state law, "gambling" is defined as "risking any money . . . for a gain that is contingent in whole or in part upon a lot, chance."<sup>180</sup> In 2014, Republican Forest Mandeville sponsored a bill in Montana called "HB 181" which aimed to "exempt qualifying fantasy sports play from the definition of Internet gambling under Montana Code."<sup>181</sup> Despite this legislative effort to ease the restrictions on fantasy sports in Montana, the state is no longer considering any amendments that allow internet-based fantasy sports leagues.<sup>182</sup>

### 4. Washington

Some of the strictest laws on online gambling and fantasy sports exist in the state of Washington.<sup>183</sup> Legislation was introduced in January 2016 that would declare operating and/or advertising fantasy sports games a Class C felony in Washington.<sup>184</sup> Hurst advocated that season-long fantasy sports involve skill and are thus legal to play in Washington.<sup>185</sup> However, Hurst has proposed a DFS bill that would make operating a DFS site in Washington a felony as he sees online fantasy games contests as games of chance.<sup>186</sup> This hostile legal

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ly Forum, a lobbying group who opposed Lopinto's bill, stressed that online fantasy games that "involve consideration in terms of a fee to participate and . . . payout partially based on luck," would be an expansion of gambling).

<sup>179</sup> *Id.*

<sup>180</sup> Mont. Code Ann. § 23-5-112 (13)(a) (2010).

<sup>181</sup> Chris Grove, *New Bill Seeks To Clarify Legality Of Online Fantasy Sports In Montana*, LEGAL SPORTS REP. (Jan. 13, 2015), <http://www.legalsportsreport.com/306/montana-fantasy-sports-bill/> (regarding HB 181, the last action took place on February 27, 2015 when the deadline was missed for the general bill transmittal); *see generally* HB 181: Montana House Bill available at <http://openstates.org/mt/bills/2015/HB181/> (last visited Sept. 29, 2016).

<sup>182</sup> *See* Rodenberg, *supra* note 133.

<sup>183</sup> David Purdum, *Washington bill targets DFS ads, operators*, ESPN (Jan. 15, 2016), [http://www.espn.com/chalk/story/\\_/id/14576172/daily-fantasy-operating-dfs-site-felony-washington-qa-representative-christopher-hurst](http://www.espn.com/chalk/story/_/id/14576172/daily-fantasy-operating-dfs-site-felony-washington-qa-representative-christopher-hurst).

<sup>184</sup> *Id.* (noting that Washington already has a law making online poker a felony in the state); *see generally* Gary Wise, *A decision between career and home*, ESPN (Dec. 10, 2010), [http://www.espn.com/espn/poker/columns/story?id=5808565&columnist=wise\\_gary](http://www.espn.com/espn/poker/columns/story?id=5808565&columnist=wise_gary).

<sup>185</sup> Purdum, *supra* note 183 (reiterating his support for season long fantasy sports by Hurst stating: "I don't have a problem with fantasy sports, fantasy sports has been around a long time." Hurst further added "I don't have a problem with people putting money into pools, for that matter. I think that's perfectly fine.>").

<sup>186</sup> Dustin Gouker, *Hearing on Daily Fantasy Sports Felony Bill Sets Stage For Wash-*

environment in Washington has caused DraftKings and FanDuel to not operate their contests in Washington.<sup>187</sup> Even though DraftKings and FanDuel do not operate in Washington, Washington residents are still finding ways to play in DFS contests.<sup>188</sup> Washington State Senator Pam Roach countered Hurst's bill with legislation that clarifies the legality of "small-scale fantasy games" and declared fantasy sports as a "game of skill, not gambling and would allow the games under limited conditions."<sup>189</sup>

### 5. Arizona

Arizona has long held that fantasy sports contests of any variety are illegal as the state defines gambling more narrowly than federal law.<sup>190</sup> In February of 2016, legislation in Arizona proposed a strike-everything amendment that would exclude fantasy sports league competitions from Arizona's definition of gambling.<sup>191</sup> The bill specifically identifies fantasy leagues as "activities that involve a fantasy team that: includes players from more than one team; provides prize details in advance; is based on participants' knowledge and skill; is won based on statistical results of more than one sporting event; and is not based on the performance of a single athlete in a single game."<sup>192</sup> Legislation was proposed to address a gray area in current state law

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ington Battle, LEGAL SPORTS REP. (Jan. 18, 2016), <http://www.legalsportsreport.com/7412/washington-daily-fantasy-sports/>; Purdum, *supra* note 183 (backing his reasoning behind the illegality of DFS by Hurst stating that "if you look at scientific probability, it is impossible to predict in that short of a timeframe the mathematical probabilities of the outcome of anything, unless you have inside or illegal information.").

<sup>187</sup> Daniel Roberts, *Are DraftKings and FanDuel legal?*, FORTUNE (Sept. 24, 2015), <http://fortune.com/2015/09/24/draftkings-fanduel-legal/> (last updated Oct. 18, 2015) (describing court documents filed by New York attorney general Eric Schneiderman showed that DraftKings collected \$422,000 in entry fees from Washington residents in 2014. Although Washington residents have been playing DFS contests in other states, DraftKings claims that 92% of the "supposed illicit cases" came from states where DFS is legal. DraftKings alleged that it had terminated access to its contests for users in the other 8% of cases).

<sup>188</sup> Geoff Baker, *How many Washington residents play DraftKings, FanDuel daily fantasy sports illegally?*, SEATTLE TIMES (Nov. 29, 2015), <http://www.seattletimes.com/sports/other-sports/how-many-washington-residents-play-draftkings-fanduel-daily-fantasy-sports-illegally/>.

<sup>189</sup> Purdum, *supra* note 183.

<sup>190</sup> Rau, *supra* note 21.

<sup>191</sup> Tim Gallen, *Arizona bill would legalize fantasy sports in the state*, PHOENIX BUS. J. (Feb. 18, 2016), <http://www.bizjournals.com/phoenix/news/2016/02/18/arizona-bill-would-legalize-fantasy-sports-in-the.html>.

<sup>192</sup> Rau, *supra* note 21.

and allows Arizona residents to participate in online fantasy games which Senator Adam Driggs (R) doesn't believe are considered gambling.<sup>193</sup> The major obstacle in passing this bill entails complying with American Indian tribes and the 2002 Indian gaming compact.<sup>194</sup>

#### D. DraftKings and FanDuel have Conflicting Views in Texas

DraftKings and FanDuel both operate in thirty-nine states, prohibit contests in ten states, but have conflicting views with regards to operation in one state: Texas.<sup>195</sup> DraftKings offers DFS contests in Texas but FanDuel does not.<sup>196</sup> In January 2016, the Texas Attorney General announced that DFS contests constitute illegal gambling under state law.<sup>197</sup> As a result of the Attorney General's opinion, FanDuel halted all DFS contests in Texas and stopped operating in the state.<sup>198</sup> DraftKings, did not agree to a settlement with Texas but instead filed a suit against Paxton, attempting to prevent him from terminating DFS contests in Texas.<sup>199</sup> Texas lawmakers plan to introduce a bill to regulate DFS when the Texas legislature returns to session in January 2017.<sup>200</sup>

## VI. ANALYSIS

Determining whether a DFS contest is one of skill or chance is vital in assessing whether the contest is legal. The section will provide support that DFS contests are games of skill not chance. Most courts will determine the legality of a gambling activity based on whether skill or chance is the dominant factor

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<sup>193</sup> *Id.* (noting that most members of the Senate Judiciary Committee said fantasy sport games do not constitute as illegal gambling).

<sup>194</sup> *Id.* (explaining that the bill currently remains pending but its ramifications could reach further than the state of Arizona).

<sup>195</sup> Roberts, *supra* note 20.

<sup>196</sup> *Id.*

<sup>197</sup> Jon Drape, *Texas Attorney General Deems Daily Fantasy Sports Illegal*, N.Y. TIMES, Jan. 19, 2016, at B11. (introducing legislation planned by FanDuel, advocating for the legality of DFS contests when the Texas legislature returns to session in 2017); *see generally* David Purdum, *FanDuel to cease paid contests in Texas in May; DraftKings files suit*, ESPN (Mar. 4, 2016), [http://www.espn.com/chalk/story/\\_/id/14903788/fanduel-texas-attorney-general-reach-settlement-cease-paid-operations-state-1](http://www.espn.com/chalk/story/_/id/14903788/fanduel-texas-attorney-general-reach-settlement-cease-paid-operations-state-1).

<sup>198</sup> Peggy Fikac, *Attorney General Paxton wants DraftKings lawsuit to be moved or dismissed*, EXPRESS NEWS (May 2, 2016), <http://www.expressnews.com/news/local/article/Attorney-General-Paxton-wants-DraftKings-lawsuit-7388419.php>.

<sup>199</sup> Purdum, *supra* note 197 (pinpointing Texas as one of DraftKings' largest markets, as Texas users paid \$179.6 million in DFS entry fees in 2015).

<sup>200</sup> *Id.*

in the result.<sup>201</sup> One of the most debated issues regarding daily fantasy sports is how much skill is required. As discussed above, a majority of jurisdictions in the United States use the Predominance Test to determine whether the chance element has been met in a gambling activity.<sup>202</sup> If a player's own ability controls at least 51% of a contest's outcome, the activity will be considered a game of skill.<sup>203</sup> While a minority of states has adopted stricter views towards daily fantasy sports, the Predominance Test provides the most favorable outcome for legalizing daily fantasy sports contests. Under this test, analyzing player statistics based on matchup probabilities or implementing strategies based on a player's valuation are variables that require an accurate assessment of skill to succeed. Gathering information from legislation used in states where the Predominance Test is implemented to determine the legality of a gambling, would be a useful method when crafting an amended version of the UIGEA to include daily fantasy sports.

#### A. Amending UIGEA 2006 to Include Daily Fantasy Sports

Congress passed the UIGEA at a time when DFS contests did not exist.<sup>204</sup> Further, the author of the UIGEA expressed no intent for the fantasy sports provision to include daily fantasy games and the actual language of the provision is vague and broad.<sup>205</sup> Therefore, a proposed uniform federal law commenting on the legality of DFS will give states a clearer explanation of whether DFS contests under federal law constitute as a game of chance or a game of skill. A necessary component for amending the "fantasy sports carve-out" provision in the UIGEA will be to clarify whether DFS contests are a game of skill or chance. The newly proposed federal law should illustrate daily fantasy sports as a game of skill instead of a game of chance for several reasons.

Since season long fantasy sports contests are games of skill under federal law, any amendment to the UIGEA incorporating the addition of daily fantasy sports needs to stress the similarities between DFS contests and traditional fantasy sports contests. From the rules of traditional and daily fantasy sports games discussed above, there are a few main differences between the two contests which include: competition, player selection, monetary reward and duration of the contest. First, in traditional fantasy sports, a participant is placed in

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<sup>201</sup> See generally Holleman, *supra* note 28.

<sup>202</sup> Meehan, *supra* note 69, at 16.

<sup>203</sup> *Id.*

<sup>204</sup> Heitner, *supra* note 18; see generally 31 U.S.C. § 5363.

<sup>205</sup> Israel & Feinman, *supra* note 99; see also Heitner, *supra* note 100.

a fantasy league and competes against the other fantasy owners in that particular fantasy league. Secondly, in a DFS contest, a participant is placed in a pool with a wide range of players. Traditional fantasy sports leagues last throughout the professional sports season whereas DFS contests consist of daily and weekly formats.<sup>206</sup> Finally, a monetary reward is paid to the participant of a traditional fantasy sports league at the end of the professional sports season whereas participants in DFS contests receive monetary rewards after each daily contest is complete. With the exceptions of only a few states, traditional fantasy sports include options that require its participants to pay an entry fee before joining a league.<sup>207</sup> DFS sports leagues require its participants to pay an entry fee before joining a contest as well.<sup>208</sup> Therefore, the skill versus chance based argument stems down to player selection.

*i. Evidence Supporting DFS Contests as Chance-Based*

Although the majority of the states support the legality of daily fantasy sports as a skill-based contest, there is growing concern that DFS contests are chance-based contests.<sup>209</sup> One aspect that is troublesome from DFS operators such as DraftKings and FanDuel is the single day randomness that can affect the outcome of the contest.<sup>210</sup> Since DFS contests take place daily as opposed to traditional season-long fantasy sports contests, a player's injury or a weather event could theatrically influence the results of a single day contest whereas these random events would likely even out over the course of a traditional season long fantasy sports game.<sup>211</sup> Some sports law experts even compared playing daily fantasy sports to placing a bet with a bookmaker.<sup>212</sup>

As noted in the rules for both fantasy contests above, traditional fantasy

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<sup>206</sup> Bass, *supra* note 71, at 504.

<sup>207</sup> See generally *Fantasy Football Prize Leagues- Frequently Asked Questions*, CBS SPORTS, <http://www.cbssports.com/fantasy/football/games/prize-leagues/frequently-asked-questions> (last visited Feb. 2, 2017).

<sup>208</sup> Bass, *supra* note 71, at 506.

<sup>209</sup> Joshua Brustein, *Fantasy Sports and Gambling: Line is Blurred*, N.Y. TIMES, Mar. 12, 2013, at B9.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> Justin Moyer, *Sorry, daily fantasy sports is gambling, not a game of skill*, Nevada says, WASH. POST (Oct. 16, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/10/16/nevada-sorry-fantasy-sports-is-gambling-not-a-game-of-skill/> (describing a comment made by Ryan Rodenberg, an assistant professor of sports law at Florida State University, on the issue of daily fantasy sports becoming a chance-based contest similar to placing a bet with a bookkeeper: “[o]n the spectrum of legality to illegality, they’re getting pretty close to the line. It’s tough to make an intellectually honest distinction between the two.”); see generally Brustein, *supra* note 209, at B9.

leagues are formed by participants drafting professional players from a pre-assigned pool of players and DFS contestants use a budget to create their rosters by selecting players from a pre-assigned pool of players. Whether a participant is competing against other owners to draft a specific player in a traditional fantasy league or calculating how much they can spend from their budget on a specific player in a DFS contest, both fantasy games involve skill to succeed. Unlike season-long fantasy sports leagues, DFS contestants have to develop efficient strategies to manage their budget to form their roster.

Critics raise the argument that a participant in a DFS contest can research and assemble a roster based on mathematical calculations but cannot predict if an injury will occur, hence thus illustrating the concept of chance.<sup>213</sup> While this argument is valid, the same concept applies to traditional fantasy sports. In 2011, Jamaal Charles, a running back for the Kansas City Chiefs, was a projected top five draft pick in traditional season-long fantasy football drafts, so he was selected in the first round of most drafts.<sup>214</sup> Unfortunately, the teams that selected Charles in the first round wasted a first round draft pick and were negatively affected for the entire season as Charles tore his ACL in the second game of the year and missed the rest of the 2011 season.<sup>215</sup> Even though injuries occur in traditional fantasy sports and inevitably affect the results, as seen with Jamaal Charles' injury in 2011, those traditional season-long contests are still legal. Furthermore, there is even a new algorithm that predicts a player's risk of getting injured.<sup>216</sup> It's extremely hard to eliminate all chance from any situation.<sup>217</sup> Amending the UIGEA to incorporate daily fantasy sports will give more clarity to daily fantasy operators as to the legality of DFS contests.

#### *ii. Professional Sports Leagues Support Daily Fantasy Sports Contests*

It is likely that an amendment to the UIGEA to incorporate daily fantasy sports into the provision, would receive support from professional sports leagues across the United States. Since DraftKings is a partner with MLB and

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<sup>213</sup> Brustein, *supra* note 209, at B9.

<sup>214</sup> *2011 fantasy running back rankings (1-15)*, NFL.COM (May 23, 2011, 4:26 PM), <http://www.nfl.com/fantasyfootball/story/09000d5d81fabe7c/article/2011-fantasy-running-back-rankings-115>

<sup>215</sup> Gregg Rosenthal, *Jamaal Charles out for season with torn ACL*, NFL.COM (Oct. 12, 2015, 5:49 PM), <http://www.nfl.com/news/story/0ap3000000555626/article/jamaal-charles-out-for-season-with-torn-acl>.

<sup>216</sup> Michael Salfino, *The Players Most Likely to Ruin Your Fantasy Season*, WALL ST. J., Aug. 19, 2015, at D6.

<sup>217</sup> Ehrman, *supra* note 66, at 107.

FanDuel is a partner with the NFL and the NBA, it's not surprising that major executives within the industry support the product.<sup>218</sup> The NBA's president of global operations and merchandising recently stated that "[d]aily fantasy could not have been possible just a short time ago based on technology's limitations."<sup>219</sup> Bill Daly, the NHL deputy commissioner and the legal officer of the NHL recently stated, "[w]e continue to believe that daily fantasy sports games are accurately characterized as games of skill . . . [and] we will see how the law develops on the subject and will adjust our activities and relationships appropriately."<sup>220</sup> The President of the Fantasy Sports Trade Association ("FSTA"), Paul Charchian, also agreed with Daly on similar lines that the acceptance of DFS will likely be "long and bumpy" but noted that "[w]e're going to battle and we're going to win."<sup>221</sup> Charchian added to his remarks made at the January 2016 FSTA conference in Dallas by stating, "[w]e need to formally legalize fantasy play in 50 states."<sup>222</sup> Lastly, the Commissioner of the MLB, Rob Manfred, expressed his support for the DFS industry by commenting on its illegality: "we were completely comfortable with the idea that [DFS] games were consistent with the existing federal law."<sup>223</sup> Manfred added, "I'm quite convinced it is a game of skill, as defined by the federal statute [a]nd I'm comfortable with the idea that it's not gambling."<sup>224</sup> MLB didn't always support DFS contests. In 2013, the chief executive of Major League Baseball Advanced Media stated that daily fantasy games "become akin to a flip of the coin, which is the definition of gambling."<sup>225</sup> The CEO of FanDuel quickly rebutted the statement made by Bowman, asserting that "[FanDuel has] done statistical analysis as to the skill nature of the game and we can actually show that it is skill-predominant."<sup>226</sup> Since Major League Baseball has since changed its stance on the legality of DFS contests as they are now investors in

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<sup>218</sup> Grove, *supra* note 74.

<sup>219</sup> Schrottenboer, *supra* note 13.

<sup>220</sup> Gregg Krupra, *Fantasy sports booming but future difficult to predict*, DETROIT NEWS (Aug. 11, 2016), <http://www.detroitnews.com/story/sports/2016/08/10/fantasy-sports-booming-future-difficult-predict/88551760/>.

<sup>221</sup> Rodenberg, *supra* note 133.

<sup>222</sup> *Id.*

<sup>223</sup> Mark Feinsand, *MLB commissioner Rob Manfred defends DraftKings partnership, says fantasy sports 'not gambling'*, N.Y. DAILY NEWS (Oct. 26, 2015), <http://www.nydailynews.com/sports/baseball/fantasy-sports-not-gambling-mlb-commissioner-manfred-article-1.2412347>.

<sup>224</sup> *Id.*

<sup>225</sup> Darren Heitner, *Daily Fantasy Sports Games Defend Legality of Their Services*, FORBES (Mar. 13, 2013, 7:56 AM), <http://www.forbes.com/sites/darrenheitner/2013/03/13/daily-fantasy-sports-games-defend-legality-of-their-services/#2668b86a9279>.

<sup>226</sup> *Id.*

DraftKings and have since hired an independent math expert to study the skill involved in daily fantasy sports contests.<sup>227</sup>

#### B. Increasing Momentum from Recent Legislation Towards Legalizing Daily Fantasy Sport Contests

The states that view DFS contests as games of chance, base their arguments on the premise that there are certain events during a sporting event that a player cannot control.<sup>228</sup> Alabama, Delaware, Hawaii, Idaho, and Nevada all contest the legality of DFS contests because they view the contests as participants risking money based on future contingent sporting events which make it a contest based on chance rather than skill.<sup>229</sup> Nonetheless, the Attorney General in Alabama stated that there is skill involved in creating a fantasy roster.<sup>230</sup> Even in a state like Iowa, where fantasy sports contests have been historically banned, momentum from recent legislation has been building in favor for the legality of DFS contests.<sup>231</sup> Iowa recently addressed the issue by stating that fantasy sports are a cultural and social phenomenon.<sup>232</sup> While legislation in a minority of

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<sup>227</sup> David Purdum & Darren Rovell, *N.Y. AG declares DraftKings, FanDuel are illegal gambling, not fantasy*, ESPN (Nov. 11, 2015), [http://www.espn.com/chalk/story/\\_/id/14100780/new-york-attorney-general-declares-daily-fantasy-sports-gambling](http://www.espn.com/chalk/story/_/id/14100780/new-york-attorney-general-declares-daily-fantasy-sports-gambling).

<sup>228</sup> See generally Ryan Rodenberg, *Daily fantasy sports state-by-state tracker*, ESPN (Aug. 27, 2016), [http://www.espn.com/chalk/story/\\_/id/14799449/daily-fantasy-dfs-legalization-tracker-all-50-states](http://www.espn.com/chalk/story/_/id/14799449/daily-fantasy-dfs-legalization-tracker-all-50-states).

<sup>229</sup> Ryan Rodenberg, *Daily fantasy sports state-by-state tracker*, ESPN (Aug. 27, 2016), [http://www.espn.com/chalk/story/\\_/id/14799449/daily-fantasy-dfs-legalization-tracker-all-50-states](http://www.espn.com/chalk/story/_/id/14799449/daily-fantasy-dfs-legalization-tracker-all-50-states).

<sup>230</sup> Dustin Gouker, *Alabama Attorney General tells DraftKings, FanDuel to Cease and Desist*, LEGALSPORTSREPORT (Apr. 6, 2016, 11:59 PM), <http://www.legalsportsreport.com/9441/alabama-ag-says-dfs-is-illegal/>. Strange illustrated his point by saying that certain factors such as “a player could fall ill before a game, be injured in pre-game warm-ups, or miss a large portion of the game due to injury or equipment failure,” are outside the control of a fantasy sports participant”. See generally Daniel Gouker, *FanDuel and DraftKings Pull Out of Alabama Ahead of Attorney General’s Deadline*, LEGALSPORTSREPORT (Apr. 29, 2016, 1:13 AM), <http://www.legalsportsreport.com/9796/draftkings-pulls-alabama-ahead-attorney-generals-deadline/>.

<sup>231</sup> Ryan Rodenberg, *Daily fantasy sports state-by-state tracker*, ESPN (Aug. 27, 2016), [http://www.espn.com/chalk/story/\\_/id/14799449/daily-fantasy-dfs-legalization-tracker-all-50-states](http://www.espn.com/chalk/story/_/id/14799449/daily-fantasy-dfs-legalization-tracker-all-50-states).

<sup>232</sup> Erin Murphy, *Iowa makes new effort to legalize daily fantasy sports betting*, THE GAZETTE (Apr. 13, 2016, 7:00 PM), <http://www.thegazette.com/subject/news/government/iowa-makes-new-effort-to-legalize-daily-fantasy-sports-betting-20160413>.



states across the country challenge the legality of DFS, proponents for legalizing the contests should look towards the recent legislation passed in New York. New York originally labeled DFS contests from FanDuel and DraftKings as contests of chance.<sup>233</sup> New York lawmakers eventually revised the legislation that previously ordered FanDuel and DraftKings to cease contests in New York and brought the matter to the New York Supreme Court where legislation was approved to legalize DFS contests.<sup>234</sup> DFS contests in New York are no longer labeled as “games of chance” or “wagers on future contingent events.”<sup>235</sup>

Since New York accounts for more than one-tenth of the DFS contestants in the United States, the minority of states that currently outlaws or challenges legislation legalizing DFS should use the legislation passed in New York as a blueprint to legalizing DFS in their states.<sup>236</sup> Despite contributing a large number of contestants to the DFS marketplace, New York, like Iowa and Alabama, was once a state that viewed DFS contests as games of chance and therefore classifiable as illegal gambling. How the state changed its viewpoint is an important distinction for other states to evaluate. One of the biggest changes New York made was increasing regulations surrounding the DFS contests offered by FanDuel and DraftKings.<sup>237</sup> The new legislation increases consumer protections, requires daily fantasy sports operators to pay a 15% tax on gross revenue, identifies highly experienced participants, portrays accurate odds of winning contests in all advertisements, and restricts players under the age of eighteen from participating.<sup>238</sup> Given the legal significance of the New York decision, other states that currently ban DFS contests should amend legislation to implement stricter regulations.

## CONCLUSION

The founders of FanDuel and DraftKings could have never anticipated the growth and success daily fantasy sports would have when the concept was created in 2009. This new industry has taken the sports industry by storm and the

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<sup>233</sup> Purdum & Rovell, *supra* note 227.

<sup>234</sup> Schrotenboer, *supra* note 13.

<sup>235</sup> Marc Edelman, *New York's New Fantasy Sports Law Creates Both Business Opportunities and Obstacles*, FORBES (AUG. 10, 2016, 9:30 AM), <http://www.forbes.com/sites/marcedelman/2016/08/10/new-yorks-new-fantasy-sports-law-creates-both-business-opportunities-and-obstacles/#5c65518621c0>.

<sup>236</sup> See generally Terlep, *supra* note 141.

<sup>237</sup> Associated Press, *New York Governor Signs Bill to Allow Daily Fantasy Sports*, WALL ST. J. (Aug. 3, 2016), <http://www.wsj.com/articles/new-york-governor-signs-bill-to-allow-daily-fantasy-sports-1470266834>.

<sup>238</sup> *Id.*

current pace of DFS does not seem to be slowing down.<sup>239</sup> The acceleration and the immediate success of DFS contests have created a small time frame for federal and state legislatures to act and regulate the new industry. While the country is still processing the legalization of DFS contests in New York, it is paramount within the next year that the UIGEA of 2006 is amended and reflects the current standards of the fantasy sports industry. Moreover, state officials need to review previous state gambling laws to identify any inconsistencies that may have existed before DFS was created. Under federal law, traditional fantasy sports are legal. Since there are many similarities between traditional season-long fantasy sports leagues and DFS contests, there is no glaring reason why federal law cannot comment on the legality of DFS. The element of chance will never go away in fantasy sports: there are some things that cannot be predicted. However, support from the major professional sports leagues and executives and recent legislation legalizing DFS contests are vital factors for Congress to consider amending the UIGEA “fantasy carve-out” provision to include daily fantasy sports.

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<sup>239</sup> See Huddleston, Jr., *supra* note 64.